In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 134.

COSMOPOLITAN MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR RELATING TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This case has been brought to this court, upon error, directly from the Circuit Court of the United States for the district of Colorado, under the act of Congress of March 3, 1891, 26 Stat., 826, chapter 517, and under that clause of section 5 of that act, which provides that an appeal or writ of error may be prosecuted from the Circuit Courts to this court "in any case that involves the construction or application of the Constitution of the United States."

The provision of the Constitution of the United States that is claimed to be involved in this case is that clause of the Fourteenth Amendment which reads as follows:

> "nor shall any state deprive any person of life, liberty or property without due process of law."

This clause of the Fourteenth Amendment is claimed to be involved in the following respects, viz.:

1. That the judgments rendered by the County Court of Ouray county, in the actions brought by The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell, respectively, were void for lack of jurisdiction over the defendant, this plaintiff in error, (a) because they were in personam, and failed to show affirmatively that plaintiff in error was doing business in the state at the time of service, which was, under the doctrine of St. Clair vs. Cox, 106 U. S., 350, necessary to support jurisdiction, and because the allegation that plaintiff in error was a foreign corporation, "with its principal office in Ouray," has been met by uncontradicted evidence that it had no office there; (b) because service upon J. M. Jardine, as the agent of plaintiff in error, even admitting him to have been a designated process agent, was, under the laws of Colorado, no notice to plaintiff in er-

ror, unless it was, at the time, doing business in the state, and conferred no jurisdiction upon the court, Jardine's authority as agent being dependent upon the doing of business in the state; (c) because the records in these cases show that service of process was made outside the county of the action, and such service, in Colorado, confers no jurisdiction on the court.

2. That if these judgments be considered in rem, the court had no jurisdiction to render them, because there was no notice by publication and no service at all, such as is required by the laws of Colorado, and under the decisions of the highest court of that state (Great West Mining Co. vs. Woodmas of Alston Mining Co., 12 Colo., 46, and Thomson vs. White, 25 Colo., 226, such service is necessary to confer upon the court jurisdiction to pronounce judgment and to condemn and sell the property.

3. That the sale of the property of plaintiff in error under the execution issued by the County Court of Ouray county, upon the judgment rendered in the action brought by William C. Fulton, was void, and deprived plaintiff in error of its property without due process of law, (a) because the judgment was rendered without jurisdiction, and (b) because it does not even appear that the judgment was

rendered against plaintiff in error, but simply that it was rendered against "Cosmopolitan Mining Company, a corporation organized under the laws of ———."

4. That the decree entered by the District Court of Ouray county in the suit to quiet title was void for lack of jurisdiction over the defendant, this plaintiff in error, (a) because the action was in personam, and the necessary jurisdictional averment, that plaintiff in error was doing business in the state, did not appear, and because, if it had appeared, it would be of no avail, for the reason that plaintiff in error offered, but was not allowed, to prove that it was not doing business there, and (b) because service upon J. M. Jardine, as the designated process agent of plaintiff in error, was, under the laws of Colorado, no service, unless the plaintiff in error was doing business in the state, Jardine's authority being dependent upon that fact.

5. That if the decree to quiet title be considered in rem, then the court obtained no jurisdiction, because there was no service by publication, nor any service such as is required by the laws of Colorado, since, under section 38 of the Code, service may not be made upon an agent of a foreign corporation unless it be doing business in the state, and, under the authority of the Colorado cases cited in paragraph 2

above, the court obtains no jurisdiction to render a judgment in rem until due service is had.

6. That the decree to quiet title was void for the further reason that the court had, under the authority of Hart vs. Sansom and the statutes of Colorado and authorities cited in our original brief, no jurisdiction to enter a decree establishing a title. Such a decree was not within the issues of that action, and could not be rendered pursuant to the subject-matter over which the court had jurisdiction, and a decree, rendered without jurisdiction of a subject-matter which authorizes the decree, which deprives a person of his property, must fall within the prohibition of the Fourteenth Amendment in reference to due process of law.

The statement of the particulars, in which it is claimed that the constitutional question is involved, has, necessarily, required some repetition of the argument made in the original brief, for, in our view, practically every point made in the case against the jurisdiction of the courts which rendered the judgments and decree presents also the question of due process of law under the Fourteenth Amendment.

We propose to discuss the question of the application and construction of this clause of the amendment, with reference to the case at bar, in the following order, viz.:

First. The proceedings of the County and District Courts of Ouray county were the acts of the state of Colorado, in the sense that the word "state" is used in the amendment.

Second. The County and District Courts of Ouray county had no jurisdiction to render the judgments and decree complained of, under the laws of Colorado, the state which created the courts, and therefore the proceedings violate the amendment.

Third. These courts had no jurisdiction, upon the general principles of the law, and their proceedings were, therefore, within the prohibition of the amendment.

First. The first question that naturally presents itself in discussing the application of this clause of the Fourteenth Amendment to an actual case is, whether the act alleged to be within the prohibition is the act of a *state*. If not, then the case is manifestly not one involving the constitutional question. There would seem to be no difficulty, in this respect, in the case at bar. All of the proceedings that are complained of as not constituting due process of law were had in the courts of Colorado, which were acting in the name of the state and were carried into effect by the power of the state. The proceedings were the acts of the state of Colorado, and within the prohibition of the Fourteenth Amendment, to the same extent that the arbitary seizure of the property by the executive, or an act of confiscation by the legislature, would have been.

In the case of Scott vs. McNeal, 154 U. S., 34, this court, in holding that a sale of real estate, through an administrator, by a probate court, in the state of Washington, void for lack of jurisdiction, and therefore not constituting due process of law, the owner of the property being alive, says, on page 45:

> "The Fourteenth Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, * * *.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its *judicial* authorities. Virginia vs. Rives, 100 U. S., 313, 318, 319; Ex parte Virginia, 100 U. S., 339, 346; Neal vs. Delaware, 103 U. S., 370, 397."

See, also:

> Yick Wo vs. Hopkins, 118 U. S., 356, 373.
>
> C., B. & Q. R. R. vs. Chicago, 116 U. S., 233, 234, 235.

If, then, the state may violate the amendment through any one of its great branches of government, it is pertinent to define which branch is claimed to have violated it in the case at bar and in what manner.

There is no act of the executive department that is complained of.

It is not contended that the legislature has enacted any law that might deprive a person of his

property without a reasonable opportunity to be heard.

The contention here is that the County and District Courts of Ouray county have deprived plaintiff in error of its property by judgments and proceedings had without jurisdiction and, therefore, without due process of law.

Second. This court has repeatedly refused to define the phrase "due process of law." It has, however, held that it was not the purpose of the Fourteenth Amendment to establish any uniform method of procedure throughout the states, nor to provide any particular method of procedure in any state. Speaking generally, it is the province of each state to prescribe for its courts the manner and method of administering justice therein, and, so long as that manner and method provide for reasonable notice, an opportunity to be heard concerning the matter to be tried, and relate to persons and things within the jurisdiction of the state, they do not violate the amendment, and judicial proceedings had in conformity therewith are not within the prohibition of the amendment. But if the courts of a state proceed in violation of the laws which that state, itself, has enacted, as the method of obtaining jurisdiction by the courts, and the effect of those proceedings is to deprive any person of his property, we contend that such proceedings do not constitute "due process of law" within the meaning of the amendment.

In the great case of Pennoyer vs. Neff, 95 U. S., 714, Mr. Justice Field says, on page 733:

> "Since the adoption of the Fourteenth Amendment to the federal Constitution, the

validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties *over whom that court has no jurisdiction* do not constitute due process of law. Whatever difficulty may be experienced in giving to these terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. *They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.* To give such proceedings any validity, there must be a tribunal, competent by its constitution—that is, *by the law of its creation*—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance."

And again, in the case of Scott vs. McNeal, 154 U. S., 34, supra, this court has said, on page 46:

"No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party."

What is meant by the expression "service of process" or "notice to the party?" Do they mean that process may be served or notice be given in any manner that may suit the whim, caprice or convenience of the officer who holds the writ, or do they mean, as Mr. Justice Field says in the above quotation, "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence?" If it is necessary, in order to constitute due process of law, that the court should, by the law of its creation, have jurisdiction of the subject-matter, why is it not equally necessary that the court should, "*by the law of its creation*," obtain jurisdiction over the defendant? In either case the court acts in the name of the state, but its acts are not legal proceedings in any sense, because the state has not authorized it to act at all under such circumstances. Any case where a person has been deprived of his property by the proceedings of a court acting without jurisdiction, owing to a failure to observe the laws of the state creating the court, is, we contend, within the prohibition of the amendment.

In the case of Walker vs. Sauvinet, 92 U. S., 90, the question presented was whether or not the trial of cases at common law without a jury constituted due process of law, the statute of the state providing that, under certain circumstances, this might be done. This court held that such a trial was due process of law under the Fourteenth Amendment, saying, on page 93:

> "This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Mur-

ray's Lessee vs. Hoboken L. & S. Co., 18 How., 280. Due process of law is process due according to the law of the land. This process in the states is regulated *by the law of the state.* * * * Here the state court has decided that the proceeding below *was in accordance with the law of the state;* and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

To the same effect is

Hurtado vs. California, 110 U. S., 516, 535.
Missouri vs. Lewis, 101 U. S., 22, 30.

Applying this principle to the County Court cases, it will, we submit, be seen that our contention that the court did not obtain jurisdiction over the plaintiff in error, because service of process on an agent, when the foreign corporation is not doing business in the state, and service of process outside the county of the action, are not permitted by the laws of Colorado, presents the question of due process of law under the amendment.

In like manner, our contention that the County Court did not, under the statutes and decisions of the Supreme Court of Colorado, have jurisdiction to render a judgment in rem, because there was no service of process, either constructive or personal, in conformity with the laws of Colorado, presents the constitutional question of due process of law. The Supreme Court of Colorado has said, in the case of Great West Mining Co. vs. Woodmas of Alston Mining Co., 12 Colo., 46, on page 55:

> "The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not '*due process of law*,' and is not according 'to the law of the land.' Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be by a *special* or a *general* judgment, * * *."

Applying the principle to the decree to quiet title, our contention that the District Court of Ouray county obtained no jurisdiction over plaintiff in error, because the laws of Colorado do not permit service upon an agent of a foreign corpration unless it be doing business in the state, involves the application and construction of the due process of law clause.

We contend, further, that under the laws and decisions of the Supreme Court of Colorado and the decision of this court in Hart vs. Sansom, 110 U. S., 151, the District Court had jurisdiction of no subject-matter, in a suit to quiet title, that would give it power to make a decree establishing a title; that such decree was, therefore, entered without jurisdiction, and, if given effect, will deprive plaintiff in error of its property without due process of law.

Under the law of Colorado, if our position is well taken, the issues presented by a suit to remove cloud from title gave no notice that a decree establishing a title would be entered or an opportunity to be heard on any matter that would authorize such a decree.

In the case of Castle vs. Persons, 117 Fed., 835, the question was presented of the right of a court to

disregard the issues made by the pleadings and render judgment on proof of facts not involved in the issues, and Mr. Justice Sanborn said, on page 843:

> "That due process of law, without which parties may not be deprived of their property, gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit on one cause of action and recover upon another, * * *."

Third. We have endeavored to show that, tested by the laws of Colorado, the state which created the County and District Courts of Ouray county, the proceedings relied upon by the defendant in error were had without jurisdiction, and therefore were not due process of law, but we also insist that upon the general principles of law these proceedings were in violation of that clause of the Fourteenth Amendment which requires due process of law.

It is unnecessary to cite authorities to this court upon the proposition that if a state court assumes jurisdiction over a person not within the state, and such person does not voluntarily submit to this jurisdiction, the proceedings do not constitute due process of law within the meaning of the amendment. Neither do we deem it necessary to cite additional authorities to the effect that a foreign corporation, which is not doing business in the state, is not present therein in any sense that will enable the courts to exercise jurisdiction over it in personam. Practically all of the authorities cited in our original brief sustain this doc-

trine, and the fact that this court has, without question, taken jurisdiction in these numerous cases, would seem to indicate that this constitutional question was involved whenever a state court assumed this jurisdiction. We do not, of course, contend that the foreign corporation could not, by a voluntary appearance, submit to the jurisdiction of the state court, or that it could not, by previous appointment, authorize any person to receive service of process of the state courts, in any action that might be brought against it, without regard to the doing of business by the corporation in the state. But in such a case the action of the corporation is purely voluntary, and we submit that the designation of a process agent in compliance with a state statute, requiring the designation of such an agent, as a prerequisite to the right to do business there, is not a voluntary act, and should not be construed as conferring any greater or other powers upon the agent than those required by the statute, and, unless the statute itself continued the authority of the agent beyond the period during which the corporation does business in the state, the agent's authority should be held to cease when the corporation no longer exercises the privilege. The numerous authorities cited on pages 72 to 78 of our original brief fully sustain this view of the duration of a designated agent's authority, and are, we believe, opposed by no authority whatever. It would seem that, so far as the jurisdiction of this court is concerned, and the nature of the constitutional question presented, the case of Mutual Life Insurance Co. vs. Spratley, 172 U. S., 602, is very similar to the case at bar. In that case the insurance company con-

tended that it was not doing busines in the state of Tennessee at the time of service of process; that the person served had no capacity to represent it; that the court, therefore, obtained no jurisdiction over it, and that the judgment, therefore, if enforced, would deprive it of its property without due process of law, contrary to the Fourteenth Amendment. Here plaintiff in error contends that it was not doing business in the state of Colorado at the time of service of process in the County Court, and met the only allegation contained in the records of those cases that could be construed as alleging that it was doing business there, viz., that it was a foreign corporation, "with its principal office in Ouray," by undisputed proof to the contrary. Here, also, plaintiff in error contends, with reference to the County Court judgments, that J. M. Jardine, the person served as its agent, even assuming that he had been designated as process agent, had no capacity to represent the plaintiff in error after it had ceased to do business in the state, and that for these reasons the County Court of Ouray county had no jurisdiction to render the judgments, and to enforce them would be to deprive plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment.

Plaintiff in error makes the same contentions with regard to the decree of the District Court of Ouray county. In this case of Mutual Life Ins. Co. vs. Spratley, in discussing the constitutional question presented, Mr. Justice Peckham says, on pages 609-610:

> "The federal question with which we are now concerned is whether the court obtained

> jurisdiction to render judgment in the case against the company, so that to enforce it would not be taking the property without due process of law. Even though we might be unprepared to say that a service of process upon 'any agent' found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. If it were, there was due process of law, * * *."

While this court held, in the Spratley case, that the corporation was doing business in the state, and that the agent was authorized to represent it, yet the constitutional question involved was substantially the same as that presented in the case at bar, and this court took jurisdiction.

Plaintiff in error further contends that the sheriff's sale, made under the four executions issued by the County Court of Ouray county, deprived it of its property without due process of law, in violation of the Fourteenth Amendment, not only on the grounds mentioned above, but also because one of these executions (that in the Fulton case) was issued on a judgment, not only void, but also not appearing to have been rendered against the plaintiff in error. If we were to assume the other three County Court judgments to be valid, and the sale to have been made under execution issued on one of these valid judgments, and the sheriff to have applied the proceeds

of the sale to the satisfaction of a void judgment, or had paid the proceeds to a person not a judgment creditor at all, the *constitutional question would not* be raised thereby, and the sale would undoubtedly be valid, because the matter would become one merely of misapplication of proceeds for which the sheriff would be liable. But that is not this case. Here the writ itself, under which the sheriff acts, as much as he acts under the other writs, is void, and inasmuch as he acts as an officer of the court, and in the name of the state, the effect is, we submit, to deprive plaintiff in error of its property without due process of law within the meaning of the amendment.

No question is raised concerning the jurisdiction of the court below, but it does appear that that jurisdiction was obtained by reason of diversity of citizenship. While section 6 of the act of March 3, 1891, provides, among other things, that the Circuit Court of Appeals shall have final appellate jurisdiction in cases where the jurisdiction of the court below was obtained by reason of diversity of citizenship alone, this court has held that, in such a case, appeal or error lies direct to this court, if the case involves the questions mentioned in section 5 of the act.

Loeb vs. Columbia Township Trustees, 179 U. S., 472, 477, 481.

Huguley Mfg. Co. vs. Galeton Cotton Mills, 184 U. S., 290, 295.

It does not seem that there can be any doubt of the controlling nature of the matters presenting the constitutional question, since they involve all of the

proceedings relied upon by the defendant in error as his sole defense, and embrace practically all of the issues in the case.

The constitutional question was presented in apt time, as it was raised by the pleadings in the amended replication (folios 29-30, Transcript), by objection to the admission of the judgments and decree in evidence (folios 94-95, 153, Transcript), and by plaintiff in error's motion for a directed verdict. The judge of the trial court has certified that it was involved in the trial of the case. (Folio 40.)

The case at bar turns wholly upon the question of the jurisdiction of the County and District Courts of Ouray county, and, under the authorities cited herein, the constitutional question, by reason of which this court takes jurisdiction, is involved.

Respectfully submitted,

WILLIAM H. MOODY,
CARLTON M. BLISS,
Attorneys for Plaintiff in Error.

JOHN A. PERRY.
GEORGE C. PRESTON.

Of Counsel:
HURLBURT, JONES & CABOT.